



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
ROBERT HEWITT)

For Appellant: John Matthews
 Attorney at Law

For Respondent: Bruce W. Walker
Chief Counsel

Jeffrey M. Vesely
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Robert Hewitt against a proposed assessment of additional personal income tax in the amount of \$164.87 for the year 1976. Subsequent to the filing of this appeal, respondent Franchise Tax Board conceded that its **proposed assessment of additional tax** for 1976 should be reduced to \$156.87.

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The issue presented is whether appellant qualified to file his 1976 tax return as a "widower with dependent child."

Appellant's wife died on November 16, 1975, and thereafter he supported his daughter, although she did not live with him. In filing his 1976 California personal income tax return appellant indicated his filing status to be a "widower with dependent child." On that return he claimed no dependent exemption credits and he failed to declare the date of his wife's death. Under those circumstances, respondent disallowed appellant's claimed status as a "widower with dependent child." In his protest against the resulting proposed additional assessment, appellant supplied the missing facts and, in due course, respondent affirmed its determination that appellant was not entitled to file his 1976 return as a "widower with dependent child," since his daughter had not lived with him throughout that year. Respondent has now conceded that appellant nevertheless was entitled to an \$8.00 exemption credit for his dependent daughter in 1976.

On the California individual income tax return (Form 540), a taxpayer is required to indicate his filing status. One of the possible classifications is "Widow(er) with dependent child," a designation which is synonymous with the term "surviving spouse" as defined in section 17046 of the Revenue and Taxation Code. A person qualifying as a surviving spouse is permitted to file a joint return for a limited period of time after the death of his or her spouse. (Rev. & Tax. Code, § 17045.).

Section 17046 provides, in pertinent part:

(a) For purposes of this part the term "surviving spouse" means a taxpayer:

(1) Whose spouse died during either of his two taxable years immediately preceding the taxable year; and

(2) Who maintains as his home a household which constitutes for the taxable year the principal place of abode (as a member of such household) of a dependent who within the meaning of Section 17056 is a son, stepson, daughter, or stepdaughter of the taxpayer, and with respect to whom the taxpayer is entitled to a credit for the taxable year under Section 17054. For purposes of this paragraph an individual shall be considered as maintaining a household only if over half of the cost of maintaining the household during the taxable year is furnished by the individual.

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Respondent's regulations (Cal. Admin. Code, tit. 18, reg. 17046, subd. (b)) provide that in a determination of whether a taxpayer meets the requirements of subdivision (a)(2) of section 17046, quoted above, reference is to be made to respondent's regulations concerning whether a taxpayer maintains a household constituting the principal place of abode for another person which qualifies the taxpayer for head of household filing status. (See Cal. Admin. Code, tit. 18, reg. 17042-17043, subds. (b) (1) and (c) .) Thus, the same criteria are to be used in determining whether the living arrangement of a taxpayer and his child qualifies him to file as a head of household or as a surviving spouse.

The relevant portions of subdivision (b)(1) of respondent's regulation 17042-17043 provide:

In order for the taxpayer to be considered a head of a household by reason of any individual, described in subsection (a) of Section 17042, -- the household must actually constitute the home of the taxpayer for his taxable year Such home must also constitute the principal place of abode of at least one of the persons specified in such subsection (a). It is not sufficient that the taxpayer maintain the household without being its occupant. The taxpayer and such other person must occupy the household for the entire taxable year of the taxpayer The taxpayer and such other person will be considered as occupying the household for such entire taxable year notwithstanding temporary absences from the household due to special circumstances. A nonpermanent failure to occupy the common abode by reason of illness, education, business, vacation, military service, or a custody agreement under which a child or stepchild is absent for less than six months in the taxable year of the taxpayer, shall be considered temporary absence due to special circumstances. Such absence will not prevent the taxpayer from qualifying as the head of a household if (A) it is reasonable to assume that the taxpayer or such other person will return to the household, and (B) the taxpayer continues to maintain such household or a substantially equivalent household in anticipation of such return. (Emphasis added.)

I/ It is to be noted that for purposes of the surviving spouse Filing status, the class of qualifying individuals is limited to a dependent son, stepson, daughter, or stepdaughter, whether by blood or adoption. (Cal. Admin. Code, tit. 18, reg. 17046, subds. (a)(2) and (a) (3).)

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Appellant admits that his daughter did not live with him during 1976. In this regard he states, "It has been impossible for me to have my daughter with me as I **work rotating shifts.**" Appellant does urge, however, that he **provided** virtually all of her support in that year.

The facts of this case clearly establish that appellant failed to **meet** the statutory requirements for surviving spouse filing status in 1976, since he did not maintain a household which constituted not only his home **but** which was **also** occupied by his daughter as her principal place of abode. Although the above regulation provides for an exception where the lack of occupancy is because of a "temporary absence due to special circumstances," **there is** nothing in the record **herein to** indicate that the **daughter's absence** was either "temporary" or "due to special circumstances," as those terms are used in the regulation.

Consequently, we conclude that respondent properly disallowed appellant's claimed filing status as a "widower with dependent child" for 1976.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Robert Hewitt against a proposed assessment of **additional personal** income tax in the amount of \$164.87 for the year 1976, be and the same is hereby modified to reflect respondent's concession that the amount of the proposed assessment of tax should be reduced to \$156.87. In all other respects, **respondent's** action is hereby sustained.

Done at Sacramento, California, this 7th day of March, 1979, by the State Board of Equalization.

William E. Burns, Chairman
Daniel O'Neil, Member
George J. Fessy, Member
_____, Member
_____, Member